

1 Michael J. McCue (NV Bar No. 6055)
2 MMcCue@LRRLaw.com
3 Jonathan W. Fountain (NV Bar No. 10351)
4 JFountain@LRRLaw.com
5 LEWIS ROCA ROTHGERBER LLP
3993 Howard Hughes Parkway, Suite 600
Las Vegas, NV 89169-5996
Tel: (702) 949-8200
Fax: (702) 949-8398

6 Attorneys for Plaintiff
7 Rock Vault Tours, Inc.

**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

11 ROCK VAULT TOURS, INC., a Delaware
12 corporation;

Case No. 2:15-cv-01863-JCM-GWF

Plaintiff,
vs.

JOHN PAYNE, an individual,

OPPOSITION TO DEFENDANT JOHN PAYNE'S MOTION TO DISMISS FOR LACK OF STANDING AND PURSUANT TO FRCP 12(B)(6), OR IN THE ALTERNATIVE MOTION FOR SUMMARY JUDGMENT

18 Plaintiff Rock Vault Tours, Inc. (“Rock Vault” or “Plaintiff”) hereby opposes the Motion
19 To Dismiss For Lack Of Standing And Pursuant To FRCP 12(B)(6), Or In The Alternative
20 Motion For Summary Judgment (hereinafter “Mot. to Dismiss”) filed by Defendant John Payne
21 (“Payne” or “Defendant”). This opposition is supported by the Declaration of Jonathan W.
22 Fountain, the memorandum of points and authorities set forth below, and any oral argument the
23 Court may entertain.

PRELIMINARY STATEMENT

25 Payne's motion jumps the gun. The gravamen of this lawsuit is that Payne, in
26 contravention of copyright law [REDACTED] has created a new rock 'n' roll
27 stage show that is similar to Rock Vault's popular Raiding the Rock Vault show, which is
28 currently being performed at the Tropicana Las Vegas.

1 Payne's principal argument is that his new show, The Rock Pack, and Raiding the Rock
 2 Vault are not similar. But Payne did not submit anything to allow the Court to analyze the shows'
 3 similarities or differences. For instance, Payne did not submit any scripts or video recording of the
 4 shows. Moreover, Rock Vault has no way of verifying or rebutting Payne's description of The
 5 Rock Pack show without discovery. Indeed, Payne claims his show has not yet been publically
 6 performed. Thus, the only person with access to the information Rock Vault needs to rebut
 7 Payne's claims that the two shows are dissimilar is Payne. Accordingly, summary judgment is
 8 premature at this very early stage of the case.

9 As for Rock Vault's false designation of origin claim, Payne's argument that the
 10 advertisement is mere puffery misconstrues the Complaint. Payne's argument that Rock Vault
 11 cannot make out a *prima facie* case is unsupported by admissible evidence.

12 [REDACTED]

13 [REDACTED]

14 [REDACTED]

15 [REDACTED]

16 [REDACTED]

17 [REDACTED]

18 [REDACTED]

19 [REDACTED]

20 Payne's motion to dismiss Rock Vault's fraud claim should also be denied. The Complaint
 21 specifically alleges Payne's false statements and explains why they are false.

22 For these reasons, and as set forth more fully below, Payne's motion should be denied
 23 without prejudice until after the completion of discovery.

24 **ROCK VAULT'S RESPONSES TO PAYNE'S "UNDISPUTED" FACTS**

25 1. Raiding the Rock Vault is advertised as "transporting the audience back to a
 26 magical musical journey from 1960 to 1990, with classic anthems from the Rolling Stones, The
 27 Who, The Doors, Led Zeppelin, Jimi Hendrix, The Eagles, Queen, AC/DC, Deep Purple, Van
 28 Halen, Journey, Heart, Free, Aerosmith, and more. . ." (See <http://www.raidingtherockvault.com>)

1 (last visited October 24, 2015).

2 **RESPONSE:** Undisputed but incomplete. First, the correct website link is
3 <http://www.raidingtherockvault.com/the-show/>. Second, the quote incorrectly says “transporting”
4 instead of “transports.” Third, the description is an advertisement. It does not constitute the entire
5 copyrighted work and Rock Vault disputes any claims that the advertisement constitutes the entire
6 copyrighted work “Raiding the Rock Vault.”

7 2. Further, Raiding the Rock Vault “features a stunning light show, video screens,
8 actors, dancers and high quality BOSE® concert sound production in the famous showroom at the
9 Tropicana Las Vegas.” (*Id.*).

10 **RESPONSE:** *See* previous response.

11 3. On July 1, 2014, following a dispute between Payne on the one hand, and Rock
12 Vault Tours, Inc., NAV-LVH, LLC, Westgate Las Vegas Resort, LLC and Harry Cowell
13 (collectively, the “Rock Vault Parties”) on the other hand, Payne filed suit against the Rock Vault
14 Parties in the Eighth Judicial District of the State of Nevada. Payne alleged, among other claims,
15 copyright infringement, breach of contract, breach of the implied covenant of good faith and fair
16 dealing, unjust enrichment, defamation, and/or slander, and violation of the right of publicity. *See*
17 Payne Declaration at Paragraph 6.

18 **RESPONSE:** Undisputed.

19 ■ [REDACTED]
20 [REDACTED]
21 [REDACTED]

22 **RESPONSE:** Undisputed.

23 ■ [REDACTED]
24 [REDACTED]
25 [REDACTED]
26 [REDACTED]
27 [REDACTED]
28 [REDACTED]

LEWIS ROCA
ROTHGERBER
3993 Howard Hughes Parkway
Suite 600
Las Vegas, NV 89169-5996

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14 [REDACTED]
15 [REDACTED]
16 [REDACTED]
17 **RESPONSE:** Undisputed.
18 [REDACTED]
19 [REDACTED]
20 [REDACTED]
21 [REDACTED]
22 [REDACTED]
23 [REDACTED]
24 [REDACTED]
25 [REDACTED]
26 [REDACTED]
27 [REDACTED]
28 [REDACTED]

1

[REDACTED]

2

[REDACTED] Payne

3

created the rock music show “The Rock Pack.” *See* Payne Declaration at Paragraph 9.

4

[REDACTED]

5

[REDACTED]

6

[REDACTED] The Rock Pack

7

show is advertised as bringing “LAS VEGAS DIRECTLY TO YOU.” (Fountain Decl. ¶ 8.)

8

Advertisements for the show specifically mention that the show is the brainchild of Payne and specifically reference that Payne co-created Raiding the Rock Vault, a show which has, to date, only been performed in Las Vegas. These statements by Payne suggest that The Rock Pack show is somehow connected to the Raiding the Rock Vault show. For example, consumers could infer that The Rock Pack is a spin-off of Raiding the Rock Vault, which Payne is now bringing on the road. In addition, the Rock Pack show is advertised as a show about the history of classic rock bands, as told through visuals, band members, and music performed by the original artists.

15

10. The Rock Pack is an unscripted show featuring original artists from six bands (Asia, Kansas, Cheap Trick, The Tubes, Starship and Toto) who discuss their careers with Payne in between songs. *See* Payne Declaration at Paragraph 9.

18

11. **RESPONSE:** Disputed. Payne did not submit a script or any video from The Rock Pack show that would permit an evaluation of the show or a comparison of the parties’ competing shows.

21

12. The Rock Pack showcases songs only from the 1980s and the songs are played in no particular order. *See* Payne Declaration at Paragraph 10.

23

13. **RESPONSE:** Disputed. Payne did not submit a script or any video from The Rock Pack show that would permit an evaluation of the show or a comparison of the parties’ competing shows.

26

14. Further, The Rock Pack contains no acting, dancing, or script unlike Raiding the Rock Vault. *See* Payne Declaration at Paragraph 11.

28

15. **RESPONSE:** Disputed. Payne did not submit a script or any video from The Rock Pack

3993 Howard Hughes Parkway
Suite 600
Las Vegas, NV 89169-5996

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1 show that would permit an evaluation of the show or a comparison of the parties' competing
 2 shows.

3 13. Upon receiving a letter from counsel for the Rock Vault, Payne removed any
 4 reference to "winning THE BEST OF VEGAS MUSICAL two years in a row," which occurred
 5 prior [to] the filing of the complaint in this matter. *See* Payne Declaration at Paragraph 13.

6 **RESPONSE:** Disputed-in-Part. Payne did remove the text from the advertisement
 7 appearing on the website link <http://kdimentertainment.com/icons-of-rock/>. *See* Fountain Decl. ¶
 8 12. However, another advertisement using the same language continues to be used by Payne. *Id.*
 9 & Ex. C. Rock Vault does not know whether Payne used the same advertisement in additional,
 10 other media (e.g., print, video, television, other websites etc.). This information is solely within
 11 Payne's possession. Rock Vault intends to explore this topic through discovery. *See* Fountain Decl.
 12 ¶ 13.

13 14. At the time the statement was up and to this date, The Rock Pack show has not
 14 taken place in Las Vegas and The Rock Pack has not been advertised as performing any upcoming
 15 shows in Las Vegas. *See* Payne Declaration at Paragraph 14.

16 **RESPONSE:** Undisputed, assuming Payne is referring only to the statement on the
 17 website. However, as indicated above, Payne is still using the advertisement on other places of the
 18 website and Rock Vault does not know whether there are additional, other mediums where the
 19 same advertisement appears. This information is solely within Payne's possession. Rock Vault
 20 intends to explore this topic through discovery. *See* Fountain Decl. ¶ 13.

21 15. To date, the only scheduled event for The Rock Pack is set for the Germain Arena
 22 on November 19, 2015 in Estero, Florida. *See* Payne Declaration at Paragraph 15.

23 **RESPONSE:** Unknown. Rock Vault has no information as to whether Payne has
 24 scheduled other events in other places. This information is solely within Payne's possession. Rock
 25 Vault intends to explore this topic through discovery. *See* Fountain Decl. ¶ 14.

26 16. Tickets for the event went on sale on September 13, 2015, only one day before the
 27 alleged false statement was removed by Payne. *See* Payne Declaration at Paragraph 16; *see also*
 28 <https://www.facebook.com/The-Rock-Pack-399481013580564/> (postdated September 13, 2015)

1 (last visited October 24, 2015).

2 **RESPONSE:** Unknown. Rock Vault has no information as to when Payne began selling
 3 tickets to The Rock Pack show. While the Facebook page seems to indicate that the tickets were on
 4 sale on September 13, 2015, it also contains an entry on September 3, 2015. Regardless,
 5 information concerning when Payne began selling tickets is information that is solely in Payne's
 6 possession. Rock Vault intends to explore this topic through discovery. *See* Fountain Decl. ¶ 15.

7 **COUNTER-STATEMENT OF FACTS**

8 This is an action for copyright infringement and other causes of action arising out of
 9 Payne's creation of a competing rock 'n' roll show that is substantially similar to Rock Vault's
 10 popular "Raiding the Rock Vault" show. Fountain Decl. ¶ 2.

11 Rock Vault produces and runs the highly popular and award winning stage show called
 12 "Raiding the Rock Vault," which is currently being performed at The New Tropicana Las Vegas in
 13 Las Vegas, Nevada. Fountain Decl. ¶ 3. Voted Best Musical in Las Vegas by the Las Vegas
 14 Review Journal readers' poll two years in a row, the Raiding the Rock Vault show is the story of
 15 classic rock, performed by members of some of the greatest rock bands in history, featuring
 16 anthems from: The Rolling Stones, The Who, The Doors, Led Zeppelin, and other iconic rock
 17 bands. *Id.* ¶ 3 & Ex. A. The show features music from the 1960s to the 1990s and is advertised as
 18 "a history of rock 'n' roll [that] will come to life in this one-of-a-kind, rock concert experience at
 19 the Tropicana Las Vegas." *Id.*

20 Rock Vault owns U.S. copyright registrations for the show's format and script (U.S. Reg.
 21 No. Pau003661723 and U.S. Reg. No. Pau003661716) (the "Copyrights"). Fountain Decl. ¶ 5.

22 Payne was a former cast member of the Raiding the Rock Vault show. Fountain Decl. ¶ 6.

23 In September 2015, Rock Vault learned that Payne had created a new show called The
 24 Rock Pack. Fountain Decl. ¶ 7. The Rock Pack show promises to bring "LAS VEGAS
 25 DIRECTLY TO YOU." *Id.* ¶ 8. Based on show's websites located at
 26 <http://kdimentertainment.com> and <http://www.theclassicrockseries.com>, its Facebook page located
 27 at <https://www.facebook.com/ClassicRockSeries>, and its Twitter feed located at
 28 <https://twitter.com/ClassicRockSeries>, The Rock Pack show appears to be a traveling show

1 planned to be performed throughout the United States beginning on November 19, 2015 in Fort
 2 Meyers, Florida. *Id.* ¶ 9. According to these websites, the show is the “brainchild” of Payne and
 3 tells a story of classic rock history, featuring songs sung by members from classic rock bands such
 4 as Asia, Toto, Kansas, Starship, Cheap Trick, and the Tubes coupled with stories from former band
 5 members. *Id.*

6 The websites further describe The Rock Pack show as a story of classic rock history,
 7 featuring songs sung by members from classic rock bands:

8 Ringmaster Payne extracts interesting facts and road stories from the cast of classic
 9 rock artists as well as pertinent visuals on huge screens. Throughout the show he sings
 10 the ASIA classics Heat Of The Moment, Only Time Will Tell, Sole Survivor and Time
 Again. Prepare yourself for an unprecedented evening of superlative music, enthralling
 stories, facts, and visuals.

11 (See <http://kdimentertainment.com/icons-of-rock/>) (last visited Sept. 9, 2015). (Fountain Decl.
 12 ¶ 10.)

LEGAL STANDARD

I. Motion to Dismiss

15 A motion to dismiss under Rule 12(b)(6) tests the complaint’s legal sufficiency. *See North*
 16 *Star Int'l. v. Arizona Corp. Comm'n.*, 720 F.2d 578, 581 (9th Cir. 1983). When considering a
 17 motion to dismiss under Rule 12(b)(6) for failure to state a claim, dismissal is appropriate only
 18 when the complaint does not give the defendant fair notice of a legally cognizable claim and the
 19 grounds on which it rests. *See Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). In
 20 considering whether the complaint is sufficient to state a claim, the Court will take all material
 21 allegations as true and construe them in the light most favorable to the plaintiff. *See NL Indus., Inc.*
 22 *v. Kaplan*, 792 F.2d 896, 898 (9th Cir. 1986). The Court, however, is not required to accept as true
 23 allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable
 24 inferences. *See Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001). A formulaic
 25 recitation of a cause of action with conclusory allegations is not sufficient; a plaintiff must plead
 26 facts showing that a violation is plausible, not just possible. *Ashcroft v. Iqbal*, 556 U.S. 662, 678
 27 (2009) (citing *Twombly*, 550 U.S. at 555).

II. Motion for Summary Judgment

1 Summary judgment should only be granted “if the movant shows that there is no genuine
2 issue as to any material fact and the movant is entitled to judgment as a matter of law.” Fed. R.
3 Civ. P. 56(a). In assessing a motion for summary judgment, the facts, along with all inferences
4 that can reasonably be drawn therefrom, must be read in the light most favorable to the party
5 opposing the motion. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587
6 (1986); *County of Tuolumne v. Sonora Cnty. Hosp.*, 236 F.3d 1148, 1154 (9th Cir. 2001). The
7 burden of demonstrating the absence of a genuine issue of material fact lies with the moving
8 party. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157 (1970); *Martinez v. City of Los Angeles*,
9 141 F.3d 1373, 1378 (9th Cir. 1998). To successfully rebut a motion for summary judgment, the
10 non-moving party must point to facts supported by the record which demonstrate a genuine issue
11 of material fact. *Reese v. Jefferson Sch. Dist. No. 14J*, 208 F.3d 736 (9th Cir. 2000). A “material
12 fact” is a fact “that might affect the outcome of the suit under the governing law.” *Anderson v.*
13 *Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). Where reasonable minds could differ on the
14 material facts at issue, summary judgment is not appropriate. *See v. Durang*, 711 F.2d 141, 143
15 (9th Cir. 1983). A dispute regarding a material fact is considered genuine, “if the evidence is such
16 that a reasonable jury could return a verdict for the nonmoving party.” *Anderson*, 477 U.S. at 248.

ARGUMENT

I. GENUINE ISSUES OF MATERIAL FACT PRECLUDE SUMMARY JUDGMENT ON ROCK VAULT'S COPYRIGHT CLAIM (COUNT I)

A. Copyright Assignments Do Not Need To Be Recorded To Be Valid

Exalting form over substance, Payne argues that Rock Vault lacks standing to assert its copyright infringement claim because Rock Vault did not record Payne’s written assignment of copyrights in *Raiding the Rock Vault* with the U.S. Copyright Office. (Mot. to Dismiss at 11, ll. 5-8.) This argument fails because written copyright assignments do not have to be recorded to be valid. *See, e.g., DeSilva Const. Corp. v. Herald*, 213 F. Supp. 184, 192 (M.D. Fla. 1962) (“Failure to record an assignment in the Copyright Office does not invalidate the document as between the parties. Neither is it available as a defense to an infringer”); *Symantec Corp. v. CD Micro, Inc.*, 286 F. Supp. 2d 1265, 1271 (D. Or. 2003) (“Failure to record the assignment of a copyright is not

1 available as a defense to an infringer"); Patry on Copyright § 5:144 ("Failure to record an
 2 assignment in the Copyright Office did not, however, invalidate the agreement between the parties,
 3 nor was it available as a defense to an infringer"). Payne submits no authority for the proposition
 4 that his written assignment of copyrights is somehow *invalid* because the ministerial act of
 5 recording it has not occurred. Exactly the opposite is true. The assignment is valid and Rock Vault
 6 has standing to sue.

7 **B. Payne Submitted No Evidence That He Has A License**

8 Payne next suggests that *if* he has a license from Mr. Kershenbaum, an alleged co-owner of
 9 the copyrights in Raiding the Rock Vault, then Payne cannot be an infringer. (Mot. To Dismiss at
 10 11, ll. 9-13.) However, it is Payne who bears the burden of demonstrating the absence of a genuine
 11 issue of material fact, *Adickes*, 398 U.S. at 157, and it is also Payne who bears the burden of
 12 proving that he has been granted a license to the copyrights in Raiding the Rock Vault. "Where
 13 Defendants assert a license defense to copyright infringement, it is the Defendants' burden to
 14 prove by a preponderance of the evidence the existence of a specific license . . ." *Oracle USA,*
 15 *Inc. v. Rimini St., Inc.*, No. 2:10-cv-00106-LRH-PA, 2015 WL 5090791, at *3 (D. Nev. Aug. 26,
 16 2015); *see also Merit Homes, LLC v. Joseph Carl Homes, LLC*, No. CV-10-2030-PHX-SMM,
 17 2012 WL 1038769, at *4 (D. Ariz. Mar. 28, 2012) ("If the copyright infringement dispute turns on
 18 whether there is a license, the burden is on the alleged infringer to prove the existence of the
 19 license").

20 Here, Payne has failed to submit any evidence that he has a license from Mr. Kershenbaum
 21 or any evidence defining what the scope of that license might be. For instance, Payne's
 22 declaration contains no statement that he has a license from Mr. Kershenbaum, and Payne's
 23 motion does nothing more than pose the question: "has Mr. Kershenbaum, as a co-owner of the
 24 Copyrights, granted Payne permission if required[?]" (Mot. to Dismiss at 11, ll. 11:12.) Rather
 25 than showing the absence of a genuine issue of material fact, Payne's motion demonstrates that a
 26 genuine issue of fact exists with respect to the existence and scope of the alleged license.
 27 Accordingly, summary judgment should be denied. *See Corbello v. DeVito*, 777 F.3d 1058, 1067
 28

1 (9th Cir. 2015) (reversing trial court's grant of summary judgment and finding genuine issue of
 2 material fact existed as to whether copyright holder granted a license); *U.S. Auto Parts Network,*
 3 *Inc. v. Parts Geek, LLC*, 692 F.3d 1009 (9th Cir. 2012) (holding genuine issue of material fact
 4 regarding whether copyright owner provided defendant with license to create derivative work
 5 precluded summary judgment); *Allman v. Capricorn Records*, 42 F. App'x 82, 83 (9th Cir. 2002)
 6 ("In this case, there are genuine issues of material fact as to whether the licenses were limited in
 7 scope and whether the licensee acted outside the scope of the license").

8 **C. Substantial Similarity Cannot Be Determined On This Record**

9 Payne next argues that the parties' competing shows, The Rock Pack, on the one hand, and
 10 Raiding the Rock Vault, on the other hand, are not substantially similar and, therefore, there can be
 11 no copyright infringement. (Mot. to Dismiss at 11, ln. 14 to 13, ln. 18.) However, Payne has
 12 failed to submit copies of the works for analysis, rendering summary judgment premature and
 13 inappropriate.

14 Copyright infringement is proven by evidence showing that: (1) the defendant had access
 15 to the copyrighted work; and (2) that the copyrighted work and the accused work are substantially
 16 similar. *Funky Films, Inc. v. Time Warner Entm't Co.*, 462 F.3d 1072, 1076 (9th Cir. 2006). To
 17 establish substantial similarity, a plaintiff must satisfy both an extrinsic test, which focused on the
 18 works' objectively copyrightable elements, and an intrinsic test, which focused on an ordinary
 19 person's subjective impression of the works, sometimes called the "ordinary observer" test. *Id.* at
 20 1077. Under the extrinsic test, dramatic and literary works are evaluated for "articulable
 21 similarities between the plot, themes, dialogue, mood, setting, pace, characters, and sequence of
 22 events" *Id.* (citation omitted). "The extrinsic test often requires analytical dissection of a
 23 work and expert testimony." *Three Boys Music Corp. v. Bolton*, 212 F.3d 477, 485 (9th Cir.
 24 2000).¹ "Substantial similarity is a highly fact specific inquiry." *Identity Arts v. Best Buy Enter.*

25
 26 ¹ "[A]nalytical dissection" refers to the process of determining which elements of a copyrighted
 27 work are subject to copyright protection and the comparison of such protectable elements to
 28 elements of expression contained in the allegedly infringing work. *Brown Bag Software v.*
Symantec Corp., 960 F.2d 1465, 1475-76 (9th Cir. 1992) (explaining that purpose of analytic
 dissection is to define scope of copyright protection).

1 *Servs. Inc.*, Nos. C 05-4656 PJH, C 06-1631 PJH, 2007 WL 1149155, at *8 (N.D. Cal. Apr. 18,
 2 2007). Generally, “summary judgment is not highly favored on the substantial similarity issue in
 3 copyright cases.” *Frybarger v. Int'l Bus. Machs. Corp.*, 812 F.2d 525, 528 (9th Cir. 1987);
 4 *Twentieth Century-Fox Film Corp. v. MCA, Inc.*, 715 F.2d 1327, 1330 (9th Cir. 1983) (“Since
 5 substantial similarity is usually an extremely close question of fact, summary judgment has
 6 traditionally been disfavored in copyright litigation”).

7 To determine substantial similarity, “the court must make a detailed comparison of the
 8 allegedly infringing and infringed works. *Litchfield v. Spielberg*, 736 F.2d 1352, 1356 (9th Cir.
 9 1984); *Christianson v. W. Pub. Co.*, 149 F.2d 202, 203, 350 (9th Cir. 1945) (noting dismissal can
 10 be granted if the copyrighted work and infringing work “are both before the court, capable of
 11 examination and comparison”). The Court cannot analyze substantial similarity if the parties’
 12 competing works are not presented to the Court for analysis. *See, e.g., Stewart v. Wachowski*, 574
 13 F. Supp. 2d 1074, 1103 (C.D. Cal. 2005) (holding accused films in copyright infringement action
 14 were not part of record, and thus court could not determine whether there were similarities
 15 between the accused films and the copyrighted works on a motion for summary judgment, stating,
 16 “Here, the court need not—indeed cannot—engage in a side-by-side comparison of the protected
 17 and accused works, since neither party has proffered the accused films as part of the record on the
 18 pending summary judgment motions”).

19 In this case, the Court cannot make a detailed comparison of Plaintiff’s Raiding the Rock
 20 Vault show and Defendant’s The Rock Pack show because Payne did not submit the works for
 21 comparison. Nor did Payne submit any scripts or video recordings of the shows. *See, e.g., Litchfield*, 736 F.2d at 1356 (in summary judgment analysis, appellate court read the copyrighted
 22 book, and viewed accused movie and read movie script); *Twentieth Century-Fox Film Corp. v. MCA, Inc.*, 715 F.2d 1327, 1329 (9th Cir. 1983) (appellate court viewed the two movies at issue to
 23 conclude that summary judgment should be denied); *Baxter v. MCA, Inc.*, 812 F.2d 421, 423 (9th
 24 Cir. 1987) (defendant attached cassette of copyrighted song and allegedly infringing score with
 25 summary judgment motion, which trial and appellate courts listened to).
 26
 27 Instead of submitting the works for comparison, Payne submitted his biased declaration,

3993 Howard Hughes Parkway
 Suite 600
 Las Vegas, NV 89169-5996

**LEWIS ROCA
 ROTHRIGERBER**

1 containing nothing more than his personal description of The Rock Pack show. For Plaintiff's
 2 Raiding the Rock Vault show, Payne submitted an advertisement from Rock Vault's website.
 3 Payne then compares these materials and concludes that the parties' *shows* are not substantially
 4 similar. But personal descriptions and advertisements are not the works that must be compared to
 5 determine substantial similarity. Payne's argument is akin to asking the Court to analyze whether
 6 two movies are substantially similar by looking only at their trailers, or to analyze whether two
 7 books are substantially similar by looking only at their dust jackets. Summary judgment should be
 8 denied because Payne has failed to submit the parties' competing works for analysis.

9 **D. Discovery Is Needed To Determine Substantial Similarity**

10 As noted above, Payne has not submitted the works at issue to permit a substantial
 11 similarity analysis. Payne may try to cure this problem on his reply by submitting copies of the
 12 script or video of Raiding the Rock Vault and The Rock Pack. Of course, any such evidence must
 13 be excluded. *USF Ins. Co. v. Smith's Food & Drug Ctr., Inc.*, 921 F. Supp. 2d 1082, 1098 (D.
 14 Nev. 2013) (“Because Smith improperly introduced new evidence in a reply, the Court declines to
 15 review this evidence”). Regardless, even if such evidence is considered, summary judgment would
 16 not be appropriate because Rock Vault has not had an opportunity to obtain any discovery or
 17 review any materials regarding Payne's new show. As Payne admits, his show premiers
 18 November 19, 2015. (Payne Decl. ¶ 15.) As Rock Vault has not seen the show, it is entitled to
 19 conduct discovery to confirm or rebut Payne's description of the show. For instance, Rock Vault
 20 needs discovery concerning: (1) the facts surrounding the creation of the show, (2) whether any
 21 scripts or rehearsal videos exist, (3) whether the show's content has changed during production, (4)
 22 documents regarding Plaintiff's Raiding the Rock Vault show, (5) documents discussing how to
 23 differentiate the parties' shows, and (6) any advertisements for The Rock Pack show that mention
 24 or reference the Raiding the Rock Vault show. Fountain Decl. ¶ 11.

25 **E. The Works Are Likely To Be Found Substantially Similar**

26 As set forth above, the Court cannot determine substantial similarity by looking at
 27 descriptions of the works and advertisements; the Court must compare the actual works
 28 themselves. However, even if the Court only looked at Payne's description of the Rock Pack show

1 and the advertisement for Raiding the Rock Vault, there are obvious similarities that demonstrate
 2 the existence of a genuine issue of material fact concerning the question of substantial similarity.
 3 Here, Payne claims the two shows are dissimilar because the time period of the music is different,
 4 the songs from The Rock Pack are not played in chronological order, the songs in The Rock Pack
 5 are sung by the original artists, and The Rock Pack does not have a script, actors, or dancers.
 6 However, Payne ignores the fact that he advertised his show as “[BRINGING] LAS VEGAS
 7 DIRECTLY TO YOU.” Fountain Decl. ¶ 8. He also advertised his show by claiming that he co-
 8 created Raiding the Rock Vault, which won two awards for best musical. *Id.* ¶ 12 & Ex. C.
 9 Customers are reasonably going to believe that The Rock Pack is a similar type of show.
 10 Moreover, Payne advertised his show as a rock concert stage show (like Raiding the Rock Vault),
 11 playing classic rock (like Raiding the Rock Vault), featuring members of classic rock bands (like
 12 Raiding the Rock Vault), with visuals (like Raiding the Rock Vault), and discussions of the band’s
 13 careers through road stories. (Payne Decl. ¶¶ 9-11.) In essence, The Rock Pack is advertised as a
 14 show about the history of classic rock bands, as told through visuals, band members, and music
 15 performed by the original artists. Differences like playing music only from a specific decade or
 16 that the songs in The Rock Pack show are sung by the original band members, are minor in light of
 17 the overall similarities between the works. In what is known as the “inverse ratio rule,” courts
 18 “require a lower standard of proof of substantial similarity when a high degree of access is
 19 shown.” *Three Boys Music*, 212 F.3d at 485 (citations omitted). And here, Payne admits he
 20 “undisputedly had access to the Rock Vault Parties’ work.” (Mot. to Dismiss at 12, ln. 2; *see also*
 21 Payne Decl. ¶ 15.)

22 Viewing the evidence in the light most favorable to Rock Vault and taking into account
 23 that Payne has admitted he had access to Raiding the Rock Vault, there is undoubtedly a genuine
 24 issue of material fact concerning whether Raiding the Rock Vault and The Rock Pack are
 25 substantially similar.

26 **II. GENUINE ISSUES OF MATERIAL FACT PRECLUDE SUMMARY JUDGMENT**
 27 **ON ROCK VAULT’S FALSE DESIGNATION OF ORIGIN CLAIM (COUNT II)**

28 **A. Payne Misconstrues Rock Vault’s False Designation of Origin Claim**

1 Payne argues that his advertisement stating that Raiding the Rock Vault was voted “THE
 2 BEST OF VEGAS MUSICAL two years in a row” is not actionable because it is mere puffery.
 3 (Mot. to Dismiss at 14, ln. 6 to 15, ln. 21.)

4 Payne’s argument misconstrues Rock Vault’s allegations. Rock Vault’s false designation of
 5 origin claim does not allege that the statement that Rock Vault won THE BEST OF VEGAS
 6 MUSICAL two years in a row is false. Rather, Rock Vault’s claim is based upon Payne’s false
 7 statement that *he* was responsible for winning the awards *two* years in a row when, in fact, he was
 8 not substantially involved in Raiding the Rock Vault the second time it won the award. The
 9 Complaint alleges the following:

10 The statement that Payne won an award for “THE BEST OF VEGAS MUSICAL
 11 two years in a row” is false. The Show was revised by Rock Vault after Payne ceased
 12 to be affiliated with the Show. The award for the second year was not related to the
 Show as it existed when Payne was involved in it.

13 (Compl. ¶ 33.)

14 Payne’s claim that he is responsible for the second award when he was not, is not an
 15 exaggerated or highly subjective form of advertising, it is a false statement of fact and, therefore,
 16 *not* puffery. *See Southland Sod Farms v. Stover Seed Co.*, 108 F.3d 1134, 1145 (9th Cir. 1997)
 17 (holding puffery is “exaggerated advertising, blustering, and boasting upon which no reasonable
 18 buyer would rely”); *Haskell v. Time, Inc.*, 857 F. Supp. 1392, 1399 (E.D. Cal. 1994) (“The
 19 distinguishing characteristics of puffery are vague, highly subjective claims as opposed to specific,
 20 detailed factual assertions”). Accordingly, the alleged statement is not “mere puffery.”

21 **B. Rock Vault Has Alleged A *Prima Facie* Case**

22 Payne argues Rock Vault cannot “establish” a *prima facie* claim for false designation of
 23 origin. (Mot. to Dismiss at 15, ln. 22 to 17, ln. 20.) Payne supports his argument with evidence
 24 outside the pleadings, such as Facebook posts and his own declaration, and seeks summary
 25 judgment. Fed. R. Civ. P. 12(d) (if “matters outside the pleadings are presented to and not
 26 excluded by the court, the motion must be treated as one for summary judgment”). Yet, none of
 27 Payne’s arguments warrants summary judgment.

28 First, Payne claims that he was “involved” with Raiding the Rock Vault show when the

1 voting for the second BEST OF LAS VEGAS award was occurring. (Mot. to Dismiss at 16, ln. 7.)
 2 While Payne's association with Rock Vault was not formally terminated until June or July 2014²,
 3 Payne was suspended in May 2014 was not involved in the changes made to the show. (Cowell
 4 Decl. ¶¶ 4-7.) More specifically, the show was revised in the following ways:

- 5 a. An entirely new set has been built which no longer involves finding the Rock
 6 Vault in the Mayan jungle;
- 7 b. The story of the show has been changed to a roadie and a tour manager telling
 8 Rock Tales;
- 9 c. There is no longer a radio DJ and his sketches;
- 10 d. The original sketches have been removed;
- 11 e. The songs are no longer performed in chronological order; and
- 12 f. The television screens displayed during songs now include more information.

13 (Cowell Decl. ¶ 6.) Given that the extent of Payne's involvement and contributions to Raiding the
 14 Rock Vault are in dispute, a genuine issue of material fact exists and summary judgment is
 15 inappropriate.

16 Second, Payne claims the advertisement could not have deceived any segment of Rock
 17 Vault's audience. (Mot. to Dismiss at 16:11-26.) Specifically, Payne claims that The Rock Pack
 18 performs in Florida and Raiding the Rock Vault performs in Las Vegas. (*Id.*) Because the shows
 19 perform in different locations, Payne argues, they do not have the same audiences. (*Id.*)

20 Payne's argument completely misapplies trademark law. Trademark law seeks to protect a
 21 trademark holder's goodwill associated with its mark and protects against those who seek to usurp
 22 that goodwill. *Fortune Dynamic, Inc. v. Victoria's Secret Stores Brand Mgmt., Inc.*, 618 F.3d
 23 1025, 1030 (9th Cir. 2010). Here, Payne claimed that his show, The Rock Pack, is connected to
 24 Raiding the Rock Vault by advertising that The Rock Pack was created by Payne, and that Payne
 25 also co-created Raiding the Rock Vault, an award winning musical in Las Vegas. Then Payne
 26 advertised that The Rock Pack intends to bring "LAS VEGAS DIRECTLY TO YOU." It is more

27
 28 ² Payne claims he was terminated in July 2014. However, his prior complaint filed at Case No:
 2:14-cv-1196-GMN-NJK indicated that he was terminated in June 2014.

1 than reasonable to infer, on summary judgment, that some Rock Pack ticket purchasers bought
 2 their tickets believing that the Rock Pack show is sponsored by, affiliated with, or connected to
 3 Rock Vault or its Raiding The Rock Vault show. Buyer confusion “as to sponsorship, affiliation
 4 or connection” is actionable, even if the two shows are not directly in competition. 4 J. Thomas
 5 McCarthy, *McCarthy on Trademarks and Unfair Competition* § 24:3 (4th ed. 2006 & Supp. 2015);
 6 *see also* Compl. ¶ 34 (alleging Payne’s false statement will cause confusion as “to the affiliation,
 7 connection, or association of Payne with Rock Vault”). In fact, it would be **unreasonable** to
 8 believe that Payne, in mentioning Raiding the Rock Vault in his advertisements, did not intend to
 9 attract audience members of Raiding the Rock Vault to also attend his new show, The Rock Pack.
 10 *Newcombe v. Adolf Coors Co.*, 157 F.3d 686, 693 (9th Cir. 1998) (“one of the primary purposes of
 11 advertising is to motivate a decision to purchase a particular product or service”) (citation
 12 omitted); *Henley v. Dillard Dep’t Stores*, 46 F. Supp. 2d 587, 594 (N.D. Tex. 1999) (“The Court is
 13 hard pressed to believe that a reasonable jury could conclude” that celebrity’s name in
 14 advertisement was not focus of ad given “one of the primary purposes of advertising is to motivate
 15 a decision to purchase a particular product or service”) (citation omitted); *F.T.C. v. Pharmtech
 16 Research, Inc.*, 576 F. Supp. 294, 301 (D.D.C. 1983) (“it is difficult to imagine that any
 17 manufacturer would sponsor an advertisement absent the purpose of influencing the purchase of its
 18 product”). Viewing the evidence in the light most favorable to Rock Vault, the advertisement at
 19 issue could deceive a segment of Rock Vault’s audience.³

20 Third, Payne claims that any false statement in the advertisement was not material because
 21 it was not likely to influence purchasing decisions. (Mot. to Dismiss at 16, ln. 27 to 17, ln. 5.)
 22 Specifically, Payne argues that the statement that the Raiding the Rock Vault show won two BEST
 23 MUSICAL awards will not influence people to purchase The Rock Pack tickets because The Rock
 24 Pack is a *concert*, not a *musical*.⁴ (*Id.*) Payne’s argument fails.

25
 26 ³ Payne also argues that he removed the advertisement promptly. This argument is addressed *infra*
 27 regarding damages.

28 ⁴ Payne also repeats his argument that the shows are not similar. This argument was already
 29 addressed in the copyright claim and incorporated herein.

1 Payne submits no evidence the statement will not influence people's purchasing decisions.
 2 (Mot. to Dismiss at 17, ll. 1-5.) He submits no declarations, surveys, expert reports, or any
 3 admissible evidence of any kind showing that prospective concert goers will not be influenced by
 4 knowing that Rock Pack's alleged creator previously won two awards for a musical. Apparently,
 5 Payne wants the Court to assume, without any evidence or authority, that purchasers and potential
 6 purchasers would not be influenced. The Court can deny summary judgment based on Payne's
 7 failure to support his argument. *See Fed. R. Civ. P. 56(c)(1)* ("A party asserting that a fact cannot
 8 be or is genuinely disputed must support the assertion by citing to particular parts of materials in
 9 the record . . .").

10 In fact, the reasonable inference, based on the evidence, is the exact opposite: that Payne's
 11 reference to Raiding The Rock Vault is intended to influence potential ticket purchasers to
 12 purchase tickets for The Rock Pack. The purpose of an "advertisement" is to influence people to
 13 purchase a good or service. *See Newcombe*, 157 F.3d at 693; *Henley*, 46 F. Supp. 2d at 594. The
 14 advertisement in question highlighted Payne's connection to Raiding the Rock Vault and to
 15 winning two BEST OF LAS VEGAS awards for the purpose of selling tickets to the Rock Pack
 16 show. For Payne to now claim his advertisement is unlikely to affect customer purchasing
 17 decisions is nothing short of unbelievable. *Pharmtech Research, Inc.*, 576 F. Supp. at 301 ("it is
 18 difficult to imagine that any manufacturer would sponsor an advertisement absent the purpose of
 19 influencing the purchase of its product"). Discovery will most certainly reveal that Payne intended
 20 the advertisement to increase sales of The Rock Pack tickets. *William H. Morris Co. v. Group W,*
 21 *Inc.*, 66 F.3d 255, 258 (9th Cir. 1995) ("If Omicron intentionally misled consumers, we would
 22 presume consumers were in fact deceived and Omicron would have the burden of demonstrating
 23 otherwise"). At this early stage of the case and viewing the evidence (or lack thereof) in the light
 24 most favorable to Rock Vault, there is most certainly a genuine issue of material fact regarding
 25 whether Payne's advertisement is or is not "likely to influence the purchasing decision" of
 26 customers.

27 Finally, Payne claims Rock Vault cannot establish damages because the advertisement at
 28 issue was removed just prior to the commencement of Rock Pack ticket sales. (Mot. to Dismiss at

1 17, ll. 6-14.) Specifically, Payne claims tickets for The Rock Pack went on sale one day before the
2 advertisement was removed. (Payne Decl. ¶ 16.) Of course, Rock Vault has no confirmable
3 information regarding when Payne began selling tickets because this information is solely within
4 the possession of Payne and discovery has yet to commence. Rock Vault also has no information
5 regarding whether Payne used the same advertisement in other mediums (*i.e.*, print, television,
6 radio, other websites). Accordingly, summary judgment would be premature.

7 However, assuming for the purposes of argument only, that tickets for The Rock Pack went
8 on sale one day before the advertisement was removed, Payne's argument is a red herring. The
9 crux of Payne's argument is that because the advertisement was removed, ticket purchasers for
10 The Rock Pack did not see the advertisement and, therefore, the advertisement could not have
11 affected their decision to purchase tickets, resulting in no damages to Rock Vault. *See, e.g.*,
12 *William H. Morris Co. v. Group W, Inc.*, 66 F.3d 255, 257 (9th Cir. 1995) (after bench trial,
13 holding plaintiff did not show "the false statement about litigation caused the damage by
14 influencing pharmacists to forego purchasing Food Plus"). But Payne ignores that fact that
15 persons who purchased tickets could have seen Payne's advertisement *before* it was removed and
16 decided to purchase tickets when they went on sale. Payne has not submitted any evidence that
17 customers who purchased The Rock Pack tickets *only* relied on advertisements that existed *after*
18 the advertisement was removed. Nor is there any evidence that no ticket purchaser viewed the
19 misleading advertisement. At the very least, Rock Vault is entitled to discovery regarding when
20 Rock Pack tickets went on sale, other advertisements, the identities of the customers who
21 purchased the tickets, and any other advertisements for the show that were used.

22 [REDACTED]
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3993 Howard Hughes Parkway
Suite 600
Las Vegas, NV 89169-5996

**LEWIS ROCA
ROTHGERBER**

1 [REDACTED]
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13 [REDACTED] For instance, Rock Vault seeks discovery into: (1) the facts surrounding the creation of the
14 show, (2) whether any scripts or rehearsal videos exist, (3) whether the show's content has
15 changed during production, (4) documents regarding Plaintiff's Raiding the Rock Vault show, (5)
16 documents discussing how to differentiate the parties' shows, and (6) any advertisements for The
17 Rock Pack show that mention or reference the Raiding the Rock Vault show. Fountain Decl. ¶ 11.
18 Accordingly, summary judgment as to Counts III and IV should be denied.
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LEWIS ROCA
ROTHGERBER
3993 Howard Hughes Parkway
Suite 600
Las Vegas, NV 89169-5996

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3993 Howard Hughes Parkway
Suite 600
Las Vegas, NV 89169-5996

**LEWIS ROCA
ROTHGERBER**

1 [REDACTED]
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13 **V. ROCK VAULT PLED FRAUD (COUNT VII) WITH SUFFICIENT
PARTICULARITY**

14 Payne argues that Rock Vault failed to plead fraud with sufficient particularity as required
15 under Federal Rule of Civil Procedure 9(b). (Mot. to Dismiss at 19, ln. 23 to 20, ln. 26.)
16 Specifically, Payne claims that Rock Vault did not allege the “time, place, and content” of the false
17 statements or explain why the statements were false. (*Id.*)

18 Payne is incorrect. [REDACTED]
19 [REDACTED]
20 [REDACTED]
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24 [REDACTED]
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7 **VI. ROCK VAULT SHOULD BE GRANTED LEAVE TO AMEND**

8 The Ninth Circuit has “repeatedly held that a district court should grant leave to amend
9 even if no request to amend the pleading was made, unless it determines that the pleading could
10 not possibly be cured by the allegation of other facts.” *Lopez v. Smith*, 203 F.3d 1122, 1130 (9th
11 Cir. 2000) (citations and internal quotation marks omitted). If, despite the foregoing, the Court is
12 nevertheless inclined to dismiss one or more Counts of Rock Vault’s Complaint, Rock Vault
13 respectfully requests that it be granted leave to amend.

14 **CONCLUSION**

15 For the foregoing reasons, Payne’s Motion to Dismiss should be denied.

16 Dated: this 19th day of November, 2015.

17 LEWIS ROCA ROTHGERBER LLP

18
19 /s/ Jonathan W. Fountain
20 Michael J. McCue (NV Bar No. 6055)
21 MMMcCue@LRRLaw.com
22 Jonathan W. Fountain (NV Bar No. 10351)
23 JFountain@LRRLaw.com
24 3993 Howard Hughes Parkway, Suite 600
25 Las Vegas, NV 89169-5996
26 Tel: (702) 949-8200
27 Fax: (702) 949-8398

28
29 *Attorneys for Plaintiff*
30 *Rock Vault Tours, Inc.*

3993 Howard Hughes Parkway
Suite 600
Las Vegas, NV 89169-5996

LEWIS ROCA
ROTHGERBER

CERTIFICATE OF SERVICE

I hereby certify that on November 19, 2015, I caused a true and accurate copy of the foregoing document entitled, **OPPOSITION TO DEFENDANT JOHN PAYNE'S MOTION TO DISMISS FOR LACK OF STANDING AND PURSUANT TO FRCP 12(B)(6), OR IN THE ALTERNATIVE MOTION FOR SUMMARY JUDGMENT**, to be filed with the Clerk of the Court using the Court's CM/ECF system, which will send electronic notice of the same to the following CM/ECF participants:

Kimberly P. Stein
kstein@nevadafirm.com
Sarah T. Bassett
sbassett@nevadafirm.com
HOLLEY DRIGGS WALCH
FINE WRAY PUZEY & THOMPSON
400 South Fourth Street, Third Floor
Las Vegas, NV 89101

Dated: this 19th day of November, 2015.

/s/ Rebecca J. Contla
An employee of Lewis Roca Rothgerber

33993 Howard Hughes Parkway
Suite 600
Las Vegas, NV 89169-5996

LEWIS ROCA
ROTHGERBER